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IN THE

# Supreme Court of the United States

LEWIS PERDUE,

*Petitioner*,

—v.—

DAN BROWN and RANDOM HOUSE, INC., IMAGINE FILMS ENTERTAINMENT, LLC, SONY PICTURES RELEASING CORPORATION, SONY PICTURES ENTERTAINMENT, INC. and COLUMBIA PICTURES INDUSTRIES, INC.,

*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION


ELIZABETH A. MCNAMARA
*Counsel of Record*
LINDA STEINMAN
JAMES ROSENFELD
CHRISTOPHER J. ROBINSON
DAVIS WRIGHT TREMAINE LLP
1633 Broadway
New York, New York 10019
(212) 489-8230

*Attorneys for Respondents Dan Brown and Random House, Inc., Imagine Films Entertainment, LLC, Sony Pictures Releasing Corporation, Sony Pictures Entertainment, Inc. and Columbia Pictures Industries, Inc.*

CHARLES B. ORTNER
CHARLES S. SIMS
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

*Attorneys for Respondents Imagine Films Entertainment, LLC, Sony Pictures Releasing Corporation, Sony Pictures Entertainment, Inc. and Columbia Pictures Industries, Inc.*

## QUESTION PRESENTED

Whether summary judgment must be denied when expert affidavits are proffered or whether it is within the sound discretion of the trial court in a copyright case to determine that expert affidavits are not determinative in deciding that there is no "substantial similarity" in protected expression between two works of popular fiction.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court, Respondents Random House, Inc., Imagine Entertainment (improperly sued herein as Imagine Films Entertainment, LLC), Sony Pictures Releasing Corporation, Sony Pictures Entertainment Inc. and Columbia Pictures Industries, Inc., state that:

Random House, Inc., a New York corporation, is a wholly owned subsidiary of Bertelsmann Publishing Group, Inc., a privately held corporation, which is in turn a wholly owned subsidiary of Bertelsmann, Inc., a privately held corporation. Bertelsmann, Inc. is a wholly owned subsidiary of Bertelsmann AG., which is privately owned.

Sony Pictures Entertainment Inc. is an indirect wholly-owned subsidiary of Sony Corporation, a publicly-traded Japanese company.

Sony Pictures Releasing Corporation and Columbia Pictures Industries, Inc. are indirect wholly-owned subsidiaries of Sony Pictures Entertainment Inc.

Imagine Entertainment is a privately held company.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully submit this brief in opposition to the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

This case involves no substantive conflict in the circuits and no issue regarding any disparity in the treatment of expert testimony in copyright cases. To the contrary, across the circuits, consistent with the applicable standards set out in the Fed. R. Evid. 702, it lies well within the discretion of the court to admit or reject expert testimony depending on whether the testimony will assist the trier of fact. Rather than presenting any issue for this Court, this case involves the run-of-the-mill review of two works of popular fiction to see if substantial similarities existed to give rise to a copyright infringement claim. The courts below did not exclude or reject the proffered declarations, but simply held that they created no genuine issue of material fact. A simple reading of the works at issue inextricably led to the conclusion that the novels' respective plots, characters, themes, and total concept and feel were radically different. In short, this case involves no novel issues and most certainly does not conflict with any decisions of this Court. There is no basis for a grant of certiorari and the petition should be denied.

In 2003, Random House published Dan Brown's novel, *The Da Vinci Code* ("*Da Vinci Code*"), an instant critical and commercial success. In the wake of that success, Petitioner Perdue launched a campaign in the press and internet that *Da Vinci Code* copied his books, *Daughter of God* ("*Daughter*")

and *The Da Vinci Legacy* ("*Legacy*").[1] When Perdue threatened to sue for copyright infringement, Brown and Random House sought a declaratory judgment of non-infringement. Perdue counterclaimed against Brown and Random House and also named as defendants the makers of the movie version of *Da Vinci Code* (together "Random House"), seeking $150 million in damages. (Cir. App. 32-95).

Relying on the respective books and other works documenting previously published historical facts and theories discussed in the books, Random House moved for judgment on the pleadings or in the alternative for summary judgment. Solely for purpose of the motion, Random House did not dispute access (the first element of a copyright claim), but argued that no reasonable juror could find that there was substantial similarity of protected expression between the books (the second element of a copyright claim). Indeed, as is commonly done in copyright claims involving popular fiction, Random House argued that the district court was more than capable of filtering out the unprotected elements and engaging in a side-by-side comparison of the remaining protected elements to determine if an ordinary observer could conclude that there was substantial similarity between the works.

In a thorough decision, the district court granted Random House's motion, holding that all of Perdue's alleged similarities were merely "unprotectible ideas, historical facts and general themes that do not represent any original

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[1] Perdue essentially abandoned any claim that *Da Vinci Code* copied from *Legacy*. (*See* Petn. App. 3a. n. 1). Throughout this brief, references to Petn. App. are to the appendix of the Petition for a Writ of Certiorari, which contains the District Court and Second Circuit opinions. References to Cir. App. are to the Joint Appendix filed in the Second Circuit.

elements of Perdue's work" and that the works were not substantially similar in plot, theme, characters, sequence, pace, setting or "total concept and feel." Petn. App. 22a, 33a.

As found by the district court, *Da Vinci Code* is a suspense novel built on complex puzzle clues, several of them connected to Leonardo Da Vinci's art. The novel opens with the murder of the curator of the Louvre, and the rest of the story follows the protagonists, Harvard Professor Robert Langdon and the curator's granddaughter Sophie Neveu, as they decipher the curator's messages. The trail of ingenious clues eventually leads them to the revelation that Jesus and Mary Magdalene were married and had descendants (including Sophie), a secret kept throughout history by the Priory of Sion. In sharp contrast, Perdue's *Daughter* is a "shoot-'em-up" thriller, involving Nazis and Russian mafia, where husband and wife protagonists battle an ultranationalist Russian leader and a megalomaniacal Cardinal seeking to depose the Pope. The secret at issue in *Daughter* involved relics documenting an entirely fictional second Messiah named Sophia, who was born and arose in Anatolia in the Fourth Century.

There was no serious dispute concerning the readily apparent conclusion that the books had radically distinct plots, characters, settings and other necessary elements to find substantial similarity. Rather, Perdue primarily argued that *Da Vinci Code* infringed *Daughter* because both books have an allegedly similar "back story" since they each cite to certain historical events and theories concerning Emperor Constantine and the Nicaean Conference, and both discussed the Gnostic Gospels (early versions of the gospels written by the Gnostics and unearthed in Egypt in 1945) and the Gospels' exploration of the feminine aspects of God, a concept known as the "divine feminine."

In a straightforward analysis, employing well-established copyright principles, the district court determined that the only similarities involved abstract themes and historical facts and theories, and concluded that there cannot be copyright infringement when Perdue "has not alleged that his unique *expression* of these ideas and themes were copied." Petn. 23. Thus, "it is without question that references to historical figures and events constitute unprotectible elements under the copyright laws." Petn App. 22a. Likewise, common stock elements or mere abstract ideas are not protected by copyright law. As the district court held, "Both *Daughter* and *The Da Vinci Code* involve the unprotectible *idea* of a mystery thriller set against a religious backdrop. As a mystery thriller, common themes of 'the wolf in sheep's clothing,' or the theme that 'history is relative and is controlled by the victors, not losers,' or the theme that 'through [the union of hero and heroine], they become much more than the sum of their parts,' are unprotectible stock themes common to the genre." Petn. App. 22a.

After separating out these unprotectible elements, the district court engaged in the routine side-by-side comparison of two popular novels intended for mass readership in order to decide whether there had been *actionable copying*, that is, copying of protectible expression amounting to infringement. Among other factors, the district court readily concluded that, "*The Da Vinci Code* is simply a different story than that told by *Daughter*." Petn. App. 30a. The district court also explained that, although both books drew on religious themes, including the divine feminine, their expression of those themes was entirely different. Considering the characters, the district court found no substantial similarity between any of them, contrasting, for example, Brown's secular, academic, bachelor Professor Langdon with Perdue's Seth Ridgeway, an ex-cop of strong athletic prowess who experiences a central crisis of faith and is

motivated throughout much of the book by the search for his missing wife. Petn. App. 31a. Finally, the district court found that no reasonable jury could find the concept and feel of the respective works to be substantially similar, noting that *Daughter* is "action-packed, with several gunfights and violent deaths" while *Da Vinci Code* is "an intellectual, complex treasure hunt, focusing more on codes, number sequences, cryptexes and hidden messages left behind as clues than on any physical adventure." Petn. App. 28a.

In reaching its decision, the district court briefly addressed (and did not reject or exclude) two so-called expert declarations submitted by Perdue. One expert, Gabriel Olsson, propounded a thirteen-page report that uses "linguistic forensics" to identify "similarities" between Brown's *Da Vinci Code* and Perdue's *Daughter* and *Legacy*. Cir. App. 307-22. Untethered by actual citations to the books and failing to identify whether an alleged similarity exists in *Daughter* or *Legacy*, the report gathers together a grab bag of abstract similarities, such as each hero is in his "late 30's to early 40's" and has "signs of aging," or each heroine is "not slim" and is "not blonde." Cir. App. 313-14, 316. The other expert, Gary Goshgarian, an English professor, submitted a five-page report which purported to identify certain elements in the books that he claimed were not, in fact, stock elements (or "generic"). Cir. App. 294-98. Yet, other than the observation that, in addition to *Da Vinci Code* and *Daughter*, there is only one other novel "of religious intrigue involving a sacred female whose existence could destroy the church," Goshgarian, like Olssen, simply lists "similarities," such as that both works supposedly involve "a gold key hidden in a key painting," or that both novels involve escapes from Zurich banks. Cir. App. 295-97. Neither expert report includes any evidence or analysis to rebut the obvious conclusion that virtually all the identified similarities were simply abstract ideas, historical

facts or stock elements that naturally flowed from the ideas and circumstances of the works.

Random House objected to the expert reports on several grounds.[2] At bottom, however, the reports were simply unnecessary and added nothing to an analysis that the district court was well-equipped to employ. The court was called on to do no more than compare works of popular fiction – not complicated computer codes or technical engineers' reports. The reports did nothing more than identify alleged similarities in the same manner that the court could (and ultimately did) determine for itself. As such, instead of excluding them, as petitioner asserts, the court was well within its discretion to find the declaration to be not "determinative."

Perdue's counsel did not seriously dispute this conclusion. Although he half-heartedly argued that the expert declarations might "help" the court in its substantial similarity analysis, at the argument below, he unequivocally agreed that "the best thing for [the court] to do is to read the books in question." Cir. App. 404. Indeed, in the end he conceded, "I agree that the test calls for you as a lay person to read [the books]. I believe that the materials we have submitted from people like Mr. Olssen and the charts we have created and everything else can help you do that. But the best tool for doing that is your own brain." Cir. App. 419.[3]

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[2] Among other things, the reports were far more prejudicial than they were probative under Fed. R. Evid. 403 because they applied the wrong legal standard on substantial similarity, hopelessly confused the issues and included verifiably false facts (such as that each work included a gold key).

[3] Perdue admits in his petition that the experts add nothing that cannot be gleaned from the books. Indeed, Perdue merely argues that

The district court addressed Perdue's expert evidence as follows:

> In support of his claims of substantial similarity, Perdue also submits declarations from John Gabriel Olsson, a specialist in forensic linguistics and Gary Goshgarian, a professor of English at Northeastern University. However, because substantial similarity is judged by the spontaneous response of the ordinary observer, expert analysis of the similarities between the two works is not determinative. *See Denker v. Uhry*, 820 F. Supp. 722, 729 (S.D.N.Y. Dec. 8, 1992) (finding expert testimony unnecessary to assess substantial similarity if the proffered testimony does not deal with the evidence or material that might help gauge the response of the lay reader).

Petn. App. 18a n. 6. The district court did not find that the law *required* it to ignore the expert declarations, merely that they and "not determinative" of substantial similarity in the case, *i.e.*, that they created no genuine issue of material fact. The district court did not, as petitioner inaccurately claims (Petn. 6), "refuse to consider" the declarations or "reject" them. Rather, it simply held that the two proffered declarations created no material issue of fact precluding the grant of summary judgment on the ground that *Da Vinci Code* simply did not infringe protectible expression of Perdue.

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certain "similarities can be gained from the books themselves, but Olsson's affidavit makes comparison much easier because each book exceeds 400 pages in length." Petn. 11.

Perdue appealed the district court's decision that no reasonable jury could find the two works substantially similar. Among his arguments on appeal, Perdue challenged the district court's refusal to deny summary judgment on the basis of his expert declarations and argued that judges may not rely on their own personal knowledge or common sense in determining what is a fact, historical theory or scenes à faire in copyright cases. 177 Fed. Appx. 121 (2d Cir. 2006); Petn. App. 1a. The Second Circuit, reviewing the evidence *de novo* and expressly considering "all of Appellant's arguments" unanimously affirmed "for substantially the reasons given by the district court." Petn. App. 5a.

Perdue is now petitioning the Court for a Writ of Certiorari to resolve a purported circuit split on the admission of expert testimony in copyright cases. Petitioner grossly misstates the current state of the law in an attempt to carve out a bright-line conflict which does not exist. He also ignores the reality that the district court in fact considered virtually all the similarities addressed in the expert declarations and concluded that they did not create a genuine dispute on the core issue of substantial similarity.

## REASONS FOR DENYING THE PETITION

Petitioner's claim to have identified a bright-line circuit split on the issue of admissibility of expert testimony on substantial similarity in claims of copyright infringement does not survive a simple review of the cases. There is no such split. Rather, well articulated and flexible general principles, drawn from Fed. R. Evid. 702, guide courts in reviewing the relevance of expert testimony on a case-by-case basis. Because these discretionary principles will continue to govern expert admissibility in any given case, the rule proposed by Petitioner would not lead to the uniformity Petitioner claims to seek.

Further, the proceedings below did not depart from the accepted course of judicial proceedings. The court of appeals affirmed a text-book application by the district court of the prevailing law in granting summary judgment in copyright cases involving literary works. The court undertook precisely the kind of detailed analysis required by law, and the expert declarations failed to create any issue of fact that would have precluded summary judgment. The decisions do not conflict with any decisions of this Court. Nor do the decisions below raise an important federal question that this Court should settle. In short, the Petition invokes none of the considerations favoring a grant of certiorari listed in Rule 10 of the Rules of the Supreme Court of the United States, and it should be denied.

## I. THERE IS NO BRIGHT-LINE CONFLICT AMONG THE CIRCUITS ON THE USE OF EXPERT TESTIMONY TO AID THE COURT IN DETERMINING SUBSTANTIAL SIMILARITY

The bright-line circuit split claimed by Petitioner simply does not exist. Petitioner has attempted to squeeze the circuits into a legal straight-jacket of his own invention. But the case law shows a flexibility and subtlety that resists such simplistic characterizations. This Court's intervention is not required, and it would not result in the uniformity Petitioner claims to seek.

Although courts in various circuits have developed (and continue to develop) procedural mechanisms for evaluating copyright infringement, the underlying principle on the admission of expert testimony is based on Federal Rule of Evidence 702 and is common to all circuits:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact

> in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed R. Evid. 702.[4]

In many if not most copyright infringement cases across the circuits, especially those involving traditional media and a broad lay audience, judges exercising their discretion will tend to discount expert testimony as unhelpful, unnecessary or even misleading. Throughout the circuits, courts routinely grant summary judgment in cases involving novels, plays and movies on the ground that there is no substantial similarity of protected expression, and do so without reliance on experts. In general, expert testimony is deemed useful in particularly complex cases involving highly technical subject matter, such as computers, music or architecture, or in cases involving works with narrowly-targeted audiences. But Rule 702 gives judges flexibility to not rely on such evidence when it would not "assist the trier of fact to understand the evidence or to determine a fact issue." This flexibility provides a good balance between ensuring a thorough and informed evaluation of the merits of a copyright infringement claim, while conserving judicial resources, limiting unnecessary costs in litigation, and avoiding unnecessary, often unhelpful, testimony.

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[4] *See, e.g., Stromback v. New Line Cinema*, 384 F.3d 283, 295 (6th Cir. 2004) (in context of 6th Circuit extrinsic/intrinsic test, "[w]hether expert testimony should be allowed in a particular case remains a matter committed to the discretion of the trial court under Federal Rule of Evidence 702"); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1179-80 (9th Cir. 2003) (citing Fed. R. Evid. 702 in finding court's disregard of expert testimony on substantial similarity well within its discretion).

### A. Petitioner's Attempt to Label the Circuits as "No Expert" and "Expert Allowed" Does Not Survive Scrutiny

Petitioner claims that the circuits are neatly divided into two camps: those that do not consider expert testimony on the issue of substantial similarity, in particular when determining which parts of the original work are "protectible," and those that do. Petn. 14. Petitioner's categorization is inaccurate and fails to acknowledge that, in the real world, the principles of Fed. R. Evid. 702 determine whether a court draws on the assistance of expert testimony in any particular case.

Perdue's petition for certiorari hinges on his initial proposition that the Second Circuit bars expert testimony to prove substantial similarity. Perdue is wrong. While the Second Circuit considers expert testimony generally unhelpful in assessing the substantial similarity of books, plays and other literary works that are generally well within the court's experience to understand, the Second Circuit generally admits expert testimony where access is an issue and in fact frequently admits expert testimony on substantial similarity in highly technical cases involving computer programming or music. Compare *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947) (no expert assistance necessary to determine substantial similarity of literary works) with *Computer Assocs. Int. v. Altai, Inc.* 982 F.2d 693, 713 (2d Cir. 1992) (expert assistance may be appropriate on substantial similarity in computer cases). Likewise, Perdue claims that the Seventh Circuit is among those circuits that do not admit expert testimony on substantial similarity, citing *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982). But the Seventh Circuit in 2001 affirmed the denial of summary judgment in a case involving complex doll designs in light of

trial testimony that included expert witnesses who testified on substantial similarity. *Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries*, 272 F.3d 441 (7th Cir. 2001).

On the other side of the coin, Perdue creates his false "split in the circuits" by arguing that the Ninth Circuit regards expert testimony as a central component of its examination of substantial similarity on summary judgment and even requires that summary judgment be denied if an expert submits an affidavit. Here, too, the jurisprudence is far more nuanced. In *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1179-80 (9th Cir. 2003), a case involving the alleged infringement of a TV documentary by a video, the Ninth Circuit found no error in the district court's refusal to rely on expert reports on summary judgment because the court had "engaged in an extensive analysis of the alleged similarities in expressive elements" and the court was therefore well within its discretion in disregarding the testimony. *See also, Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (stating only that the extrinsic test "often" requires analytical dissection of a work and expert testimony), *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 2006 U.S.App. LEXIS 22231 (9th Cir. Aug. 30, 2006) (affirming grant of summary judgment to defendants on ground of no substantial similarity, where the court below gave little consideration to the expert report submitted).[5]

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[5] In his discussion of Ninth Circuit law, Perdue makes much of the holding in *Shaw v. Lindheim*, 919 F.3d 1353, 1356-57 (9th Cir. 1990), that satisfaction by the plaintiff of the first part of that circuit's bifurcated substantial similarity test (extrinsic) "creates a triable issue of fact" which precludes summary judgment. Petn. 15-16 & n. 7. Some commentators initially suggested that following *Shaw* there could be no defense summary judgment in such cases because almost any objective expert analysis of substantial similarity testimony would create a disputed issue of fact. Since *Shaw*, however, district courts in the Ninth Circuit frequently have granted defense summary judgments and the

Likewise, Perdue claims that the Sixth Circuit follows the Ninth Circuit and relies on expert testimony on substantial similarity. But, here, too, the lines are not so neatly drawn. The Sixth Circuit has recently held that, as here, when the subject matter involves "a literary work aimed at a general audience, expert testimony will seldom be 'necessary' to determine substantial similarity." *Stromback*, 384 F.3d at 295 (no need to remand for expert testimony in analysis of similarities between poem and movie because admissibility of expert evidence on substantial similarity is at the discretion of the court and this is not a complex case involving a computer program or functional object).

### B. Expert Testimony is Admissible on Substantial Similarity When Appropriate

Because the courts below did not exclude the proffered declarations but merely held that they created no genuine issue of fact on the determinative issue of substantial similarity, this case affords no opportunity for this Court to consider the extent to which such evidence can be excluded. But in fact, even if that issue were presented on these facts, courts are in wide agreement that district courts may admit expert testimony in assessing substantial similarity when the expert's scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. As a result, it is common across the circuits for courts to rely on expert testimony in cases involving specialized technology or a specialized audience. *See Kohus v. Mariol*, 328 F.3d 848 (6th Cir. 2003)

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Ninth Circuit has routinely affirmed them. *See* M. Nimmer and D. Nimmer on Copyright § 13.03[E][3][b][iv] and *Funky Films, Inc. v. Time Warner Entm't Co., L.P.* 2006 U.S.App. LEXIS 22231 (9th Cir. Aug. 30, 2006). Courts are clearly using judicial discretion to discount, disregard or simply refuse to admit much expert testimony, and, under *Rice*, they are doing so with the approval the Ninth Circuit.

(remanding with suggestion that expert testimony may be necessary to distinguish the protectible elements of a latch subject to industry standards and to interpret technical drawings from a trained engineer's point of view on substantial similarity).

At one end of the spectrum, across the circuits, expert assistance in analysis of substantial similarity is commonly employed in computer cases at the individual discretion of the court. *See, e.g., Computer Assocs. Int'l. v. Altai, Inc.* 982 F.2d 693, 713 (2d Cir. 1992) ("we leave it to the discretion of the district court to decide to what extent, if any, expert opinion, regarding the highly technical nature of computer programs, is warranted in a given case"); *Whelan Assoc., Inc. v. Jaslow Dental lab, Inc.*, 797 F.3d 1222, 1233 (3d Cir. 1986) (expert testimony admissible on substantial similarity in copyright cases "involving exceptionally difficult materials," in that case computer programs); *Stromback v. New Line Cinema*, 384 F.3d 283, 295 (6th Cir. 2004) (expert evidence may be admissible on substantial similarity in computer cases at the discretion of the court); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992) (approving use of experts on objective analysis of substantial similarity to computer programs); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 835 (10th Cir. 1993) (foreseeing extensive use of experts in cases involving computer programs).

Courts throughout the country are also increasingly looking to expert assistance in other complex, specialized areas such as music or architecture. Here, as well, no uniform principles control. Rather, courts of appeals emphasize that the district courts should use their discretion in the given case to determine whether or not the specific facts of the case merit expert intervention. *See Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004) (admitting expert testimony to identify protectible elements of a musical work

and substantial similarity); *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 945 (8th Cir. 1992) (relying on expert testimony in music infringement case); *Johnson v. Gordon*, 409 F.3d 12, 19 (1st Cir. 2005) (same); *Dawson v. Hinshaw Music, Inc.*, 905 F.3d 731, 738 (4th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990) (remanding music infringement case with instructions to take expert testimony on specialized audience if necessary to determine substantial similarity); *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1300-1301 (D.C. Cir. 2001) (declining to rule on admissibility of expert testimony for substantial similarity in architectural works case and remanding to district court to develop briefing on issue); *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 05-2866, 2006 U.S. App. LEXIS 21153 at *46 (1st Cir. Aug. 18, 2006) (expert assistance may be appropriate on substantial similarity in complex cases and leaving to the district court on remand whether or not to admit expert testimony on substantial similarity in architectural design case). *See also Boone v. Jackson*, 03 CV 8661, 2005 U.S. Dist. LEXIS 13172 (S.D.N.Y. June 30, 2005) (in granting summary judgment for defendant, district court cites repeatedly to expert testimony on substantial similarity of two rap songs).

Further, several circuits hold that whether or not the subject matter is technical in nature, expert testimony may be appropriate on substantial similarity if the intended audience is specialized. *See, e.g., Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 803 (4th Cir. 2001) (remanding for reevaluation of substantial similarity because the intended audience for a Barney-like character costume is a child, not the adult purchaser of the product); *Kohus v. Mariol*, 328 F.3d 848, 857 (6th Cir. 2003) (expert evidence may be necessary to evaluate response of intended audience of trained engineers).

When, as here, the subject matter is not technical or unduly complex and the intended audience is not specialized, expert testimony on substantial similarity is routinely rejected or accorded little weight, and certainly does not automatically defeat summary judgment, as Petitioner suggests. Thus, it is common for courts across the circuits to not consider or to discount experts in cases involving commonplace literary and visual works directed at lay audiences, such as the popular novels at issue here. *See O'Neill v. Dell Publ'g Co.*, 630 F.2d 685, 690 (1st Cir. 1980) (in comparing two novels, "although we may not be qualified literary critics, we are fitted by training and experience to compare literary works and determine if they evidence substantial similarity"); *Rice*, 330 F.3d at 1180 (9th Cir.) (no error in district court's refusal to rely on expert reports on substantial similarity of video and TV documentary because it had undertaken its own extensive analysis); *Stromback*, 384 F.3d at 295 (6th Cir.) (in analyzing "a literary work aimed at a general audience, expert testimony will seldom be 'necessary' to determine substantial similarity"); *Nelson v. Grisham*, 942 F. Supp. 649, 652-53 (D.D.C. 1996) (discounting expert analysis on substantial similarity of two books because the books themselves are the only relevant evidence), *aff'd*, 132 F.3d 1481 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998); *Kay Berry Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199 (3d Cir. 2005) (illicit copying or unlawful appropriation decided without aid of experts). This reluctance to rely on experts comports with the notion that the court is supposed to be analyzing the works from the perspective of the "ordinary person."[6]

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[6] *See also, e.g., Sahuc v. Tucker*, 300 F. Supp.2d 461, 465, n. 1 (E.D. La. 2004) (admitting plaintiff's expert testimony on substantial similarity of photographs but giving it "little weight" because of the layperson standard); *Gentieu v. Tony Stone Images/Chicago, Inc.*, 225 F.

Finally, suggesting that courts are incapable of making such judgments on their own, Perdue argues that courts should give substantial weight to expert testimony on one particular aspect of the substantial similarity analysis for literary works, namely the court's identification of unprotectible elements such as stock themes, scenes à faire, and historical facts or theories. But it is widely recognized to be within a court's ken to determine, for example, that a murder at the beginning of a mystery is a stock element or that historical facts concerning Emperor Constantine and the Nicaean Conference are not protectible. Indeed, courts across the circuits routinely decide that a wide range of allegedly infringing elements constitute stock themes or scenes à faire without relying upon expert testimony. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50-51 (2d Cir. 1986) (finding that "drunks prostitutes, vermin and derelict cars" are scenes à faire for book about the Bronx); *Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 319-20, 325 (6th Cir. 2004), *cert. denied*, 543 U.S. 959 (discounting expert testimony regarding poem and determining that alleged similarities were stock themes and scenes à faire that were "ubiquitous in literature and the cinema"); *Rice*, 330 F.3d at 1180 (9th Cir.) (approving

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Supp.2d 838, 855 n. 14 (N.D. Ill. 2003) (admitting expert testimony on substantial similarity of photographs, despite a lack of technical complexity; "expert testimony on substantial similarity is not impermissible as such" but it "cannot create material factual issues where they conflict with the controlling 'total concept and feel' standard"); *Rice v. Fox Broad. Co.*, 148 F. Supp.2d 1029, 1055 n. 23 (C.D. Cal. 2001) (stating that it did not rely on expert affidavits on protectible elements because neither were "very relevant"), *aff'd*, 330 F.3d 1170 (9th Cir. 2003).

determination of scenes à faire in video of magic tricks when district court refused to rely on proffered expert testimony).[7]

Likewise, courts in many circuits routinely separate out unprotectible facts or factual theories without relying on expert testimony. *See, e.g., Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980), *cert. denied*, 499 U.S. 841 (1980) (no use of expert testimony in finding historical facts concerning the explosion of the Hindenberg airship not protectible); *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1179-80 (C.D. Ca, 2001), *aff'd*, 90 Fed. Appx. 496, 498 (9th Cir. 2003) (refusing to use expert testimony on summary judgment in separating out as unprotectible the facts of plaintiff's life in works of fiction and non-fiction); *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1261 (11th Cir. 1999) (no use of experts in finding that information in novel about black Seminoles warriors is unprotectible historic fact).

* * * * *

In short, Perdue is wrong on every count when he claims to identify a conflict between the circuits which is "well-established, shows no sign of diminishing, and affects the outcome in any case in which substantial similarity is the sole issue." Petn. 18. There is no such conflict requiring this Court's attention. Any differences do not break down neatly into the kind of bright-line division between "no expert" and "expert allowed" circuits that Perdue proposes. Rather,

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[7] *See also Nelson v. Grisham*, 942 F. Supp. at 653 (D.C.) (disregarding expert affidavits and deciding for itself what similarities were actually scenes à faire); *Ty, Inc. v. GMA Accessories, Inc.*, 959 F. Supp. 936, 941-42 (N.D. Ill. 1997) (analyzing animal duffle bags and rejecting expert assistance in removing aspects of the works that are not required by a depiction of the animal), citing *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502 (7th Cir. 1994).

consistent with Rule 702, courts continue to exercise discretion in determining whether to admit and rely on expert testimony in the analysis of works for substantial similarity, and do not find that the mere proffer of an opposing "expert affidavit" requires denial of summary judgment otherwise due for lack of substantial similarity.

The operative consideration is whether expert testimony will be helpful to the court. Under that standard, courts rely on expert testimony on complex subjects, but remain understandably reluctant to admit expert testimony on substantial similarity of literary works, especially popular fiction. Even if admitted, there is likewise no bright line rule, as Perdue suggests, that would dictate the denial of summary judgment simply because an expert has weighed in. At bottom, the role and import of expert testimony in a copyright case is decided on a case-by-case basis. Because of that discretion, no copyright plaintiff can predict the outcome of his suit based on the circuit he files in.

The consequence of Perdue's proposal is clear: to defeat summary judgment in a copyright infringement case, all one would need to do is to hire a so-called "expert" to submit an affidavit claiming substantial similarity of protectible expression between the works at issue. Under a *per se* rule requiring the denial of summary judgment whenever a paid expert opines on the issue of substantial similarity, district courts would be stripped of their authority under the Federal Rules of Civil Procedure to consider whether an affidavit creates a "genuine issue" of material fact requiring a trial of a copyright infringement claim (Rule 56(c)), the gatekeeper function of the district courts would be vitiated in its entirety, and the floodgates would be open to meritless copyright infringement cases which ought never reach a jury.

## II. A GRANT OF THE WRIT OF CERTIORARI IS NOT APPROPRIATE BECAUSE THE EXPERT DECLARATIONS DID NOT RAISE ANY ISSUES OF FACT PRECLUDING SUMMARY JUDGMENT

Petitioner conclusorily asserts that his expert declarations created genuine issues of fact because they "contradicted the court's assumptions about history, about literature, about the genre, and about which scenes and devices were stock." Petn. 7. Yet, far from explicating why certain elements should not be considered "facts" or "stock elements," the expert declarations did nothing more than create laundry lists of supposed similarities – virtually the same supposed similarities proffered by Perdue in opposition to the motion that were expressly considered by the court. Instead of creating an issue of fact, the court concluded that these elements did not make the works substantially similar and "any slightly similar elements are on the level of generalized or otherwise unprotected ideas." Petn. App. 35a. In sum, the district court acted well within its discretion under Fed. R. Evid. 702 in concluding that the two expert declarations proffered by Perdue were not "determinative" of the substantial similarity analysis.

### A. The District Court was Entirely Capable of Determining Substantial Similarity in This Literary Case

Expert testimony was hardly necessary for the court to compare *Da Vinci Code* and *Daughter* and to apply the substantial similarity analysis. The works at issue are literary works; indeed, they are popular thrillers aimed at lay audiences – not computer programs or other complex subject matters beyond the understanding of a district judge. *See O'Neill v. Dell Publ'g Co.*, 630 F.2d 685, 690 (1st Cir. 1980) (in comparing two novels, "although we may not be qualified literary critics, we are fitted by training and

experience to compare literary works and determine if they evidence substantial similarity"). This was hardly a case of complex analysis in a complex medium. The intended audience of the works is neither specialized nor technically savvy. Consistent with countless similar claims, the district court engaged in a thorough side-by-side analysis of the works themselves and found no actionable similarity. A three judge panel of the Second Circuit, reviewing *de novo,* agreed.

Contrary to Perdue's claims, the court was quite capable of listening to the parties' arguments and evaluating the literary works to filter out scenes à faire, unprotectible ideas, and factual material as part of its substantial similarity analysis. The district court's conclusion that certain, largely abstract, elements in both works were scenes à faire was hardly a reach. Petn. App. 22a. It was well within the district court's purview to conclude, for example, that it is common in thrillers to have a murder at the beginning of the novel or to have story lines such as "two organizations or people who would stop at nothing, including murder, to obtain physical evidence," or that "the hero and heroine became unwilling participants in the struggle between the competitors to obtain the physical evidence." Petn. App. 22a. Nor was the district court out of its depth in finding unprotectible such banal themes as "the wolf in sheep's clothing," the theme that "history is relative and is controlled by victors, not losers," and the theme that "through [the union of hero and heroine], they become much more than the sum of their parts." It was not the failure to adequately consider his expert reports that doomed Perdue's claim. Perdue's copyright claim failed because no fact finder could find that his unique *expression* of these ideas, themes and story lines were copied.

Courts have routinely identified ideas and scenes à faire on the basis of no more than their own personal knowledge.

*See, e.g., Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996) (finding without expert evidence that "electrified fences, automated tours, dinosaur nurseries, and uniformed workers" are all "classic scenes à faire that flow from the uncopyrightable concept of a dinosaur zoo"); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50-51 (2d Cir. 1986) (finding that "drunks prostitutes, vermin and derelict cars" are scenes à faire for book about the Bronx); *Berkic v. Crichton*, 761 F.2d 1289, 1293-94 (9th Cir. 1985) ("depictions of the small miseries of domestic life, romantic frolics at the beach, and conflicts between ambitious young people on the one hand, and conservative or evil bureaucracies on the other" unprotectible as scenes à faire in novel about young couple); *Evans v. Wallace Berrie & Co., Inc.*, 681 F. Supp. 813, 817 (S.D. Fla. 1988) (finding that "sand dollar as currency, foods made of seaweed, seahorses for transportation and plates made of oyster or mother of pearl are not protected similarities of expression, but . ... naturally follow from the common theme of an underwater civilization").

Likewise, the district court hardly needed expert testimony to determine that much of the allegedly infringing material were religious and historical facts or theories. Perdue *admitted* that conclusion and nothing in his expert reports contradicted it. Indeed, as the district court noted, in Perdue's own Author's Note, he stated that, "[t]his is a work of fiction based on fact . . . The sections of this book dealing with the Nicaean Conference and the events and religious controversies leading up to it are true and far better documented than the scriptures in the Hebrew or Christian bible or the Muslim Koran." Petn. App. 25a. Perdue also conceded, again noted by the district court, that "[m]uch of his research [about the sacred feminine and the Great Goddess] involved the Gnostic Gospels...and works

commenting upon those Gospels."[8] Petn. App. 25a. In short, the court did not take any evidentiary leap of faith in concluding that these facts and theories were unprotected. Indeed, "the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis." *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980).

Finally, the district court played its traditional role in determining that most of the alleged similarities were merely abstract ideas. Thus, for example, Perdue's petition emphasizes that Professor Goshgarian testified that, to his knowledge, only two mystery thrillers – namely *Da Vinci Code* and *Daughter* – have the theme that evidence of the divine feminine exists which is a threat to the Catholic church. Petn. 8. Yet, even if true, such expert testimony was simply irrelevant since the shared similarity is only an abstract idea, not protectible expression, and, as the district court detailed at length, the expression of the idea of the divine feminine in each work is radically different. In sum, the district court did not require an expert to properly strip away stock themes and storylines or factual theories, or to readily conclude that the expression of abstract similarities identified by Perdue were dramatically different in each work.

### B. The Declarations Added or Changed Nothing in the Court's Analysis

Perdue's expert reports raised no issues of fact for the simple reason that the district court made extensive findings

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[8] Also in the record were excerpts from one of the most well-known historical non-fiction works commenting on the Gnostic Gospels; a work that Perdue acknowledged he relied on. Civ. App. 102-117.

on exactly the same elements that Perdue's experts claimed to analyze. Thus, for example, Goshgarian argued that the *Da Vinci Code* and *Daughter* were "suspiciously similar"[9] because both novels share a "secret sacred female" who was wronged by the Church, both have opening murders involving an "older art-expert male with a big secret," and both involve a "gold key hidden in a key painting." Cir. App. 294-98. Yet, each of these supposed similarities (and others he cites) were considered by the court and found to be either outright false – for example, *Daughter* does *not* include a gold key, but only a gold ingot embossed with a swastika and Herman Goering's account number – or merely abstract ideas (like the divine feminine) that cease to be similar once the actual expression of the respective novels is considered. Petn. App. 23a n. 7.; 24a, 26a-27a.

The district court was not aided by Olssen's laundry lists and charts supposedly documenting similarities in the works.

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[9] Goshgarian, not a lawyer, relies on the wrong legal standard, looking to whether the works contain "suspicious similarities" rather than "substantial similarities." Cir. App. 297-98. Olssen's declaration was hopelessly muddled and confusing. It purports to compare *Legacy, Daughter* and *Da Vinci Code* but provides virtually no page references to identify the alleged similarities. Thus, one has no means to verify the accuracy of his contentions and no means to discern whether he is plucking a supposed element from *Legacy* or *Daughter* when he contends that a similar feature appears in *Da Vinci Code*. As recognized by numerous courts, a judge is better off comparing the actual works than relying on random lists put together by experts or advocates. *Williams v. Crichton*, 84 F.3d 581, 590, (2d Cir. 1996) (rejecting plaintiff's list of similarities between two books because such lists are "'inherently subjective and unreliable,' particularly where 'the list emphasizes random similarities scattered throughout the works,'" quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985)); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 52 (2d Cir. 1986) (the "works themselves supersede and control contrary descriptions of them" so that each film "was the best and most relevant evidence on substantial similarity").

The "similarities" identified in Olssen's declaration are virtually identical to those identified by Perdue in his motion and expressly considered by the district court. (Compare Petn. App. 20a – 33a with Civ. App. 310-322). To cite but one example: Olssen's attempt to cite similarities in the characters in the novels was thoroughly debunked by the district court. In detail the court considers and rejects, in turn, any similarity between *Da Vinci Code*'s heroes and heroines, Robert Langdon and Sophie Neveu, and *Daughter*'s Seth and Zoe Ridgeway, or the novel's entirely distinct villains. Petn. App. 30a-32a.

In sum, the two expert reports proffered by Perdue did not provide any evidence that was not considered in some way by the courts below and most certainly provided no basis to disturb the thorough and well-reasoned grant of summary judgment.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

*Counsel of Record*

Elizabeth A. McNamara
Linda Steinman
James Rosenfeld
Christopher J. Robinson
DAVIS WRIGHT TREMAINE LLP
1633 Broadway
New York, New York 10019-6708
Phone (212) 489-8230
Fax (212) 489-8340

*Counsel for Respondents*
*Dan Brown, Random House, Inc.,*
*Imagine Films Entertainment, LLC,*
*Sony Pictures Releasing Corporation,*
*Sony Pictures Entertainment Inc. and*
*Columbia Pictures Industries, Inc.*

Charles B. Ortner
Charles S. Sims
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036-8299
Phone (212) 969-3000
Fax (212) 969-2900

*Counsel for Respondents*
*Imagine Films Entertainment, LLC,*
*Sony Pictures Releasing Corporation,*
*Sony Pictures Entertainment Inc. and*
*Columbia Pictures Industries, Inc.*

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RECORD PRESS, INC., 229 West 36th Street, N.Y. 10018—17512—(212) 619-4949
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